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In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY.
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT, SKELLY OIL COMPANY
(Including Answer to Amicus Curiae Brief)

REFERENCE DESIGNATIONS

In this Brief Petitioners will be sometimes designated and referred to as "plaintiffs" and the Respondent will likewise be referred to as "defendant" or "Skelly." By the term "United States," we designate and refer to the Government of the United States of America, its Secretary of the Interior and its Commissioner of Indian Affairs and their "Superintendent" and The United States Geological Survey and its "Supervisor." Reference abbreviations in this Brief are: (App. —) to the printed Appendix; (Pet. Br. —) to Petitioners' Brief; (Am. Br. —) to the Amicus Curiae Brief of the United States.

I. NATURE OF THE CASE

Because Petitioners did not adequately do so we must state the case.

This is an action *in contract* (App. 1, 17, 18, 41) instituted in the District Court of Oklahoma County, Oklahoma, by the above named plaintiffs, Comanche Indian heirs of Ma-Rah-Wad-Di, Comanche 2660, who died owning restricted lands in Stephens County, Oklahoma. The action sought to recover (App. 3, 4) a money judgment in the amount of One Hundred Fourteen Thousand and No/100 ($114,000.00) Dollars representative of the "royalty" (App. 18-19, 41) alleged to be due upon casinghead gas asserted by plaintiffs to have been "flared" into the air and not "marketed." The land is designated as:

> Southeast Quarter (SE¼) of Section Three (3), Township Two North (2N), Range Eight West (8W) in Stephens County, Oklahoma.

In the hands of the named heirs the land was and is federally restricted, subject only to alienation or leasing by and with the consent and approval of the Secretary of the Interior of the United States and subject only to leasing upon a "Departmental Lease." The lease referred to in this action is known and commonly referred to as "The Aitson Lease." The land was leased to Skelly by and upon a Departmental Lease, a copy of which is attached to plaintiffs' original Petition (App. 5-11). The only issue (App. 18-19) tendered by plaintiffs in the case was and is whether the defendant, under the contract, owes the amount of the stipulated royalties upon and for casinghead gas which was produced but not marketed.

The various statements (Pet. Br. 4, 5, 7, 10, 11) contained in the briefs filed here by the petitioners and by Amicus Curiae (Am. Br. 1, 2, 4, 6) to the effect that this was an action "for damages to the leasehold estate" and "for damages by reason of alleged waste of gas" and for tortious and negligent injury to the freehold, are erroneous and are not justified. It is clear from the record that this is an action where plaintiffs seek to recover *upon the contract* the amount, to be mathematically determined, of royalties due under the terms of the contract for casinghead gas "produced" by the defendant as lessee in an existing lease but which gas was not "marketed" by said lessee. This is plainly, patently and unmistakably the nature of the case.

1. At page 17 of the Appendix appears a motion filed in the court below to require the plaintiffs to elect whether they will proceed upon the contract or upon tort. At page 18 appears the "Journal Entry" covering the order made by the trial court upon this motion which *by agreement of the parties,* strikes from the Petition the allegation that defendant violated the conservation statutes of the State of Oklahoma and denies defendant's motion to require an election upon the following recited commitment of plaintiffs' counsel to the court:

> "2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition *and that only recovery in contract will be sought in this action by plaintiffs,* the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative Motion of said defendant to require

separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason;". (Emphasis ours.)

2. In the Amended Petition (App. 41), the plaintiffs say that "plaintiffs have been damaged in the loss of royalty, * * * in the amount of One Hundred Fourteen Thousand and No/100 ($114,000.00) Dollars."

3. As pointed out hereinafter, there would not have existed and there did not and will not exist any venue in Oklahoma County, Oklahoma, for an action to recover damages to the property of the plaintiffs, to-wit: the land and leasehold estate of plaintiffs. Venue for this was exclusively in Stephens County, Oklahoma (App. 44, 45). See 12 O.S.A. 131, *infra*. Plaintiffs chose the Oklahoma County forum rather than Stephens County or the United States District Court.

The true and only question was and is therefore: What were and are the rights, duties and obligations of the parties *under the lease* as that lease is regulated, controlled and extended by applicable statutes and regulations promulgated by the United States which, *under the contract* and under existing law, may alone enforce these obligations by recovery of amounts said to be due under the contract? In light of the argument of the Solicitor General in his Amicus Curiae Brief, these are particularly important matters.

II. POINTS RAISED BY THE DEMURRER

The Demurrer of the defendant (App. 44), as sustained by the trial court, was directed to the Amended Petition of the plaintiffs (App. 39). It raised, primarily and essentially, three (3) major points.

1. *The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.*

2. *Even assuming, arguendo, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition, do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.*

3. *Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in this Court.*

III. STATEMENT OF THE CASE—THE RECORD.

1. The Amended Petition and the Lease.

(1) The Amended Petition.—This Petition (App. 39) was substantially the same as the original Petition (App. 1) after a portion thereof was stricken by agreement (App. 18) and to which the trial court had previously sustained demurrer (App. 37). The Amended Petition incorporated by reference (App. 40) Exhibit A to the original Petition (the lease) and repeated plaintiffs' demand for recovery of royalties due under the terms of the lease.

There is no allegation in either the original or Amended Petition (App. 1, 39) of a specific violation of the rules and regulations of the Secretary of the Interior or that what was done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is neither allegation of adverse

action by the Secretary nor of application to the Secretary (or his designee) and his arbitrary or fraudulent refusal to hear or decide or to grant relief.

We have set out for the convenience of the Court the nature of the pleadings, and now will set out the particular portions of the lease (and the Rules and Regulations of the Secretary of the Interior which are necessarily and inherently a part thereof) which are pertinent and necessary to be considered in connection with our points and which we believe to be absolutely controlling in support thereof.

(2) The Lease.—Lessee's obligation is stated (App. 5) in the following language:

> 3.(b) "(1) To drill *and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining land not the property of the lessor,* or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage." (Emphasis ours.)

The following royalty provision of the lease (App. 7) is very significant in at least two respects:

> 3. "(c) Rental and royalty.—To pay, beginning with the date of *approval of the lease by the Secretary of the Interior,* a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, *together with a royalty of 12½ percent of the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be 'royalty free'.*" (Emphasis ours.)

The following additional provision (App. 7) with respect to royalties and to whom and how they shall be paid is also significant and vital to one of the major questions presented here:

> 3.(c) "All rental and royalty payments except as provided in Sections 8(a) and 4(c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the Superintendent." (Section 8(a) applies only when supervision by the Secretary has been relinquished. Section 4(c) applies only when royalty is paid in kind.)

In connection with monies due to be paid to the government official, monthly statements are provided for (App. 7) in the lease:

> "(d) Monthly statements.—To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor."

It is provided in the lease (App. 7) that lessee agrees:

> "to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to the prevention of waste and preservation of the property and the health and safety of the workmen; * * *."

The Secretary's right of inspection (App. 7) is stated:

> 3. "d. The leased premises and all wells, producing operations, improvements, machinery and fixtures

thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior."

The Secretary's agents, the "Supervisor" and the "Superintendent" are designated (App. 5) as follows:

"2. The term 'oil and gas supervisor' as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term 'superintendent' as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased."

The authority of the Secretary and his agents over the drilling and production of wells (App. 5) is stated:

3.(b) "(1) * * * Provided, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior, * * * Provided, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated;".

The broad and exclusive authority conferred upon the Secretary of the Interior is established by the following covenant contained (App. 9) in the lease:

"10. Drilling and producing restrictions.—It is covenanted and agreed that the Secretary of the Interior

> may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, * * *."

A very significant provision of the lease, and in our judgment, a controlling one, is found in numerical paragraph 6. It reads (App. 7) as follows:

> "6. Cancellation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease *before restrictions are removed*, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, *and after a hearing*, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall *then* be entitled and authorized to take immediate possession of the land; *Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.*" (Emphasis ours.)

With respect to removal of restrictions and relinquishment of supervision, it is provided (App. 9) in the lease:

> "8. Relinquishment of supervision by the Secretary of the Interior.—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. *Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as provided in section 3(c).*" (Emphasis ours.)

In the lease it is stated (App. 7) that lessee agrees:

"(g) Regulations.—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases; Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

2. Rules and Regulations of the Secretary of the Interior.

These Regulations are found in "Chapter 1—Bureau of Indian Affairs—Title 25 Part 189 (effective till 1957) and Part 172 (effective in 1957 and thereafter)—Leasing of Allotted Lands for Mining" and "Code of Federal Regulations—Title 30—Mineral Resources Chapter II—Part 221—Oil and Gas Operating Regulations." The references hereinafter contained will be to the numerical sections of the Chapters and Parts above referred to.

As indicated by the title description just given, Title 25, Sections 189.1 and 172.1, *et seq.*, deal with "Leasing," the form and requisites of the lease and definitions of terms to be used therein and of officers upon whom duties and responsibilities are to be cast thereby, such as "superintendent" and "supervisor," two of the most important of said officers for present consideration.

Title 30, Sections 221.1, *et seq.*, as indicated, deal with Oil and Gas Operations, that is, the control under the overall plan which the Government, as *guardian* of the Indians, has arranged, promulgated and placed in operation. These regulations also specify and define the controlling agencies of the Government.

Sections 189.1 and 172.1 each reads:

"§ 189.1 (172.1) Definitions. (a) The term 'superintendent' in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the allotments involved.

"(b) The term 'supervisor' in this part refers to a representative of the Secretary of the Interior, under direction of the Director of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid."

With respect to the type and form of leases to cover restricted Indian land such as that here involved, Sections 189.32 and 172.32 each reads:

"§ 189.32 (172.32) Forms. The forms prescribed for use in connection with the regulations in this part are designated as follows, and may be obtained from the superintendent at a cost of 10 cents each:

* * * * * *

"5-154h. (Revised Apr. 24, 1935) Oil and gas lease."

Each of such leases *must* provide that all bonuses, rents, any royalties, including advance rentals and royalties shall be paid to the Department through the "Supervisor" and the "Superintendent," both designees of the Secretary of the Interior:

"§ 172.14 Payment of advance rentals and royalties. (a) Except as provided in paragraphs (b), (d) and (f) of this section, all rents, royalties and other pay-

ments due under leases which have been or may be approved in accordance with this part shall be paid by check or bank draft to the order of the Treasurer of the United States and transmitted through the supervisor to the Superintendent for deposit to the credit of the various lessors. When lessees and purchasers are instructed, in writing, by the Superintendent, which instructions shall be complete as to lessors for each lease, separate remittances for each payment due each lessor shall be made to the Superintendent." (Paragraphs (b), (d) and (f) are irrelevant here.)

The Secretary and his designees are referred to as follows:

"§ 221.2 Definitions. The following terms as used in the regulations in this part shall have the meanings here given:

"(a) Secretary. The Secretary of the Interior, except where lands in naval petroleum reserves are involved, and in that case the Secretary of the Navy.

* * * * * *

"(c) Supervisor. A representative of the Secretary, under administrative direction of the Director, authorized and empowered to supervise and direct oil and gas operations and to perform other duties prescribed in the regulations in this part, or any subordinate of such representative acting under his direction.

* * * * * * *

"(e) Superintendent. The Superintendent of an Indian agency, or other officer authorized to act in matters of record, law, and collections with respect to oil or gas leases for restricted Indian lands."

The function and controlling effect of these "Regulations" are made crystal clear:

"§ 221.1 Introduction. The regulations in this part will govern the development and production of deposits of oil, gas and casinghead or natural gasoline, including propane, butane, and other hydrocarbons, and fluids, and lands containing such deposits *owned or controlled by the United States, and under jurisdiction of the Secretary by law or administrative arrangement.* The regulations in this part shall be administered under the Director of the Geological Survey, except that as to lands within naval petroleum reserves they shall be administered under such official as the Secretary of the Navy shall designate." (Emphasis ours.)

The authority of the "Supervisor" for any district is stated:

"§ 221.3 Jurisdiction. Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, *determination of royalty liability,* receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or noncompliance with duties by the lessee and, in general, *all operations subject to the regulations in this part are under the jurisdiction of the supervisor* for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *" (Emphasis ours.)

The general functions of the Supervisor are stated:

"§ 221.4 General Functions. The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable

regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the Supervisor, and to any area plan of development that may be adopted pursuant to law. * * *"

In Section 221.18 it is provided:

"The Lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, * * *."

In Section 221.21 the obligation of the lessee is further stated:

"(c) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor."

Section 221.35 reads in part:

"The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Again the Regulations are specific and exclusive as to who shall be entitled to receive any monies due from the lessee on account of operations under the lease, Section 221.40 reading in part:

> "(a) When due in money, the lessee shall tender all payments of rental and royalty by check or draft on a solvent bank, or by money order drawn to the order of the appropriate receiving officer, * * *."

Strict accounting is required of the lessee to be made to the Indian Department only. Section 221.62 reads:

> "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *"

And 221.63 reads:

> "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

And Section 221.60 provides:

> "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor."

And then providing for an administrative remedy for the lessors as well as for any other aggrieved and interested party, are Sections 172.23 and 221.66 of Titles 25 and 30 respectively.

The part of Title 25, Section 172.23 which is here pertinent reads:

> "(a) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, *or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated.*" (Emphasis ours.)

And then Title 30, Section 221.66 provides for administrative remedy and review of all orders made and entered under authority of the regulations:

> "§ 221.66 Appeals. * * *
>
> "(a) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of facts must be made under oath.
>
> "(b) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises and that officer shall review the record and render such a decision in the case as he deems proper.
>
> "(c) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's decision. * * *"

IV. SUMMARY OF ARGUMENT

1. Plaintiffs having chosen their forum are bound by its requirements, their agreements in open court and orders pursuant thereto, including venue requirements and the nature of their action in that venue.

2. Preliminary legal premises are important, i.e., the procedural code of Oklahoma, the requirements thereof and established practices thereunder including (1) the demurrer and its functions, (2) the judicial notice to be taken, (3) the effect of exhibits pleaded, (4) the established rule that a judgment which is right for any reason must be affirmed, and (5) the controlling effect of venue statutes affecting the forum chosen.

3. A pending action in a chosen forum will not be construed to be of such a character as to make it justiciable only in a forum of different venue where it is susceptible of construction as being of another character which would make it initially justiciable in the chosen forum, and especially is this true where agreement of the parties in open court has been acted upon by that court to establish its initial justiciable character in the forum where pending.

4. Petitioners, plaintiffs below, had no "standing" as distinguished from "capacity," to maintain the instant suit since the instant suit is clearly and only an action in Oklahoma County upon the contract to recover royalties alleged to be due on account of gas used in the production of oil under supervision and regulation of the Secretary of the Interior and could not be construed to be an action to establish, maintain and protect the rights of the plaintiffs in and to their real property located in Stephens County,

Oklahoma, in which latter county sole venue for such latter action would lie.

5. Vested rights acquired by the defendant-lessee under a Departmental Lease and the rules and regulations of the Secretary of the Interior which were a part thereof could not be impaired by retroactively vesting in plaintiffs a power or authority which they did not have, and which if exercised contrary to previous actions or acquiescence by the Secretary of the Interior, or his agents, would impair the obligation of defendant's contract and take its property without due process of law. Neither the Secretary of the Interior nor Congress has been or could be vested with power or authority to give "consent" or otherwise to accomplish this result.

6. The scope and extent of governmental authority over operations by lessee is well established, the lessee having been at all times bound thereby and operations by the lessee of and upon the lease consistent with supervision by and direction of the Secretary of the Interior, furnished lessee under the Constitution of the United States with complete protection against adverse claims of Indian wards growing out of such compliance.

7. The contentions of the Petitioners, and the supporting position of the Solicitor General in his Amicus Curiae Brief upon behalf of the United States would, if sustained, sound the death knell to effective regulation by the United States of the affairs of its restricted Indian wards, contrary to long established precedent and solely as a matter of judicial fiat contrary to the intent and purpose of the Congress of the United States.

8. The authorities cited by the Petitioners in their Brief and those cited by the Solicitor General in his Brief are inapposite. They deal with situations entirely different in that they deal with justiciable controversies of a character or characters forbidden to be entertained by the District Court of Oklahoma County, Oklahoma, the forum chosen by the plaintiffs.

9. The past actions and decisions of the Secretary of the Interior and his authorized agents in the course of supervision over the operations of the Aitson Lease, previously acted upon by the lessee, are presumed to have been right and proper and in that regard are not subject to judicial review or reversal nor are they subject to be ignored and given no effect. Certainly this is true in the absence of any allegation or claim of arbitrary, illegal, fraudulent, corrupt or unreasonable action by the Secretary in this regard.

10. Plaintiffs have not exhausted their administrative remedy specifically provided in and by the lease and by the rules and regulations promulgated by the Secretary of the Interior, and until they have done so they cannot have access to any court.

11. Correction here of basic, fundamental and constitutional error committed by the Supreme Court of Oklahoma adverse to the Respondent and destructive of its constitutional rights will leave nothing for this Court to review, and the judgment below must be either affirmed or the Writ of Certiorari heretofore issued by this Court should be recalled, set aside and vacated, or if there be remand, it should be with directions to the Supreme Court of Oklahoma to dismiss plaintiffs' appeal to that court.

V. ARGUMENT AND AUTHORITIES

1. Preliminary Legal Premises

(1) Demurrer.

Petitioners are bound by their choice of the forum. Under the code of civil procedure of Oklahoma a "demurrer" raises every legal question arising out of and apparent from the face of the pleading (or of absence of essential fact) which is dispositive of the case as far as the instant pleading is concerned. And if it appears as a matter of law that there can be no recovery upon the basis of such pleading or upon proper judicial notice, factually or legally, the demurrer must be sustained. A demurrer does not admit the truth of conclusions of law or statements of fact themselves disproved or rendered immaterial upon the face of the pleading or controlling exhibits. *Southern Surety Co.* v. *Municipal Excavator Co.*, 61 Okla. 215, 160 Pac. 617, 619 (1916); *Williams* v. *Phillips Petroleum Co.* (Okla. 1965), 406 P.2d 474, 477; *Savage* v. *Woods* (Okla. 1954), 268 P.2d 858, 860; *State ex rel Nesbitt, Attorney General* v. *Liberty National Bank and Trust Co.* (Okla. 1966), 414 P.2d 281, 284-285); *Diehl* v. *Phillips Petroleum Co.* (Okla. 1962), 376 P.2d 203, 206; *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 989-990 (1943).

(2) Effect of Exhibit.

It is fundamental and elementary that the express terms and provisions of an exhibit attached to a petition and which constitutes the basis for the asserted right to recover, controls the allegations of the petition. If authority need be cited on this point, see *Droppelman* v. *Horsley* (C.A. 10, 1967), 372 F.2d 249.

(3) Judicial Notice.

As to judicial notice on demurrer to petition, see: *Corliss* v. *Davidson & Case Lbr. Co.*, 183 Okla. 618, 84 P.2d 7, 10 (1938); *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 990 (1943); *Chisholm* v. *Stephenson* (Okla. 1961), 363 P.2d 229.

(4) Effect of Judgment.

It is well established that if a judgment appealed from is right for any reason or upon any legal basis, it must be permitted to stand. *Witmer* v. *United States* (3rd Cir., 1938), 96 F.2d 745, 746; *Hall* v. *Deal*, 205 Okla. 46, 234 P.2d 384, 389 (1951); *Wilson* v. *Berryhill*, 181 Okla. 213, 73 P.2d 449, 453 (1937).

The judgment of the trial court in the case at bar was affirmed (App. 61-69, 73) by the Supreme Court of Oklahoma in its entirety. It was affirmed, not only for the reason that (1) plaintiffs had no right to prosecute or maintain the action because of their contract and the federal law applicable thereto, but also because (2) the pleadings disclosed that plaintiffs could not recover on the merits (a) because they were not the real parties in legal interest, and (b) defendant had done nothing in violation of the contract, and (c) there had not accrued any unpaid liability or obligation for the payment of "royalty" under the lease or otherwise.

(5) Venue.

This is a point which petitioners ignore and Amicus Curiae avoids. The Oklahoma code provides for limitations upon venue. While an action upon a simple contract, neither involving an interest in real property nor damage to land, is transitory and may be brought wherever the defendant may be properly served with process, an action *in contract or otherwise* for recovery of damages to land or involving tortious or illegal use or taking thereof or therefrom must be brought in the county where the land lies. 12 O.S.A. 131 reads in part:

> "Actions for the following causes must be brought in the county in which the subject of the action is situated, * * *:
>
> "1st, For the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest.
>
> * * * * * *
>
> "5th, For all damages to land, crops, or improvements thereon, action must be brought in the county where the damage occurs."

—*Atchison, Topeka & Santa Fe R. Co.* v. *Superior Court of Creek County, Oklahoma* (Okla. 1962), 368 P.2d 475;

Fox v. *Superior Court of Creek County, Oklahoma* (Okla. 1962), 368 P.2d 484;

Ross v. *District Court of Oklahoma County, Oklahoma,* 199 Okla. 573, 188 P.2d 861 (1948);

Sinclair Prairie Oil Co. v. *District Court of Pottawatomie County, Oklahoma,* 180 Okla. 455, 70 P.2d 94 (1937).

Any contrary decisions by the Supreme Court of Oklahoma were prior to the 1957 amendment to 12 O.S.A. 131 which added paragraph 5th.

This explains the significance of the express limitation (App. 17, 18-19) of this suit by counsel for the plaintiffs to one *on the contract*. Faced with a preliminary motion requiring election, plaintiffs' counsel elected formally and conclusively to proceed *ex contractu* upon the lease because they knew that an action for damages or "waste" would have to be instituted, if at all, in Stephens County, Oklahoma, where the leased land was located and that in such case their pending suit in Oklahoma County would have to be dismissed for want of venue. The only action which could be brought upon the lease to recover "royalty," was for a percentage of "oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased," specifically excepting oil and/or gas used by the lessee for development and operational purposes on the lease, "which oil or gas shall be 'royalty free.'"

2. The Merits

At the outset of this Brief, we stated the three major points relied upon to support the demurrer. We proceed first to a discussion of each. But initially, we wish to make clear that which plaintiffs have tended to confuse and improperly limit by incorrect statements in their Brief. We do not contend, as suggested by plaintiffs, that simply because plaintiffs are Indians they have no capacity to sue in an action properly maintainable by them. It is not want of "capacity" to sue as "citizens" but rather legal inability to maintain *this* suit for *several* reasons, sounding in both law and contract.

We make no claim, and neither the trial court nor the Supreme Court of Oklahoma held, that the Indians here were "incapacitated" to sue in a state court in a *proper* case upon a *proper* cause of action assertable by them. Not only did the Supreme Court of Oklahoma make it perfectly plain (App. 61-69) that it was not holding that the Indians would not have a right to sue in proper case but made it also perfectly plain that the case as presented and determined upon the demurrer was decided upon the merits.

We are not in disagreement with the decisions in the cases cited and quoted from by plaintiffs and Amicus Curiae in their briefs. But it needs to be noted that those cases all deal with factual situations and claims entirely different in character from those in the case at bar. Except as to venue, we make no distinction between state and federal courts as to jurisdiction. The rules we contend for apply to whatever court of record in which the suit may have been properly filed. We do not claim that plaintiffs have no standing to appear as litigants in a proper case in either state or federal court. We simply say, as held by Judge Kennamer in *Seber* v. *Spring Oil Co.* (D.C., Okla. 1940), 33 F.Supp. 805, that they are not the ones authorized by law and the contract which is the basis of the action to seek the relief. The law and the contract forbid it. The question is thus one of "standing" to recover rather than one of "capacity" to sue, as this distinction is recognized in many decisions by this Court. This recognizes no distinction between a restricted Indian, as plaintiff, and an unrestricted non-Indian or white man *under the same conditions.* If an unrestricted white man (and especially if at the time of suit he is under guardianship) had made a lease agreement containing all

the covenants and provisions which the Departmental Lease in suit here contains (vesting complete control in another), the rule which we contend for would be equally applicable to him.

Conditions precedent to the bringing of this action have not been made or performed or alleged. Underlying requisite determination by the Secretary of the Interior (exclusively his function), which are conditions precedent to the maturing of a cause of action, have either been made contrary to the existence of a cause of action or have not yet been made at all and are not alleged. Recovery cannot be had by plaintiffs because the right of determination is not vested in them but on the contrary is exclusively vested by law and the contract in another. Rule No. 17, Federal Rules of Civil Procedure. A permitted course by the Secretary under the contract and the law precludes any triable controversy. No case or authority cited by plaintiffs touches this situation or holds in anywise to the contrary, even by the slightest inference.

The Court will not find in any case relied on by plaintiffs or Amicus Curiae any holding that plaintiffs may ignore the law and the contract and seek a recovery which that law and that contract deny them the right to have. How absurd it is to argue that one person can sue for a judgment which must be rendered in favor of another and executed, if at all, in favor of another, a stranger to the suit and not even constructively present therein. Such would be "the wards" suing in behalf of "the guardian" (App. 42).

The Court will find, as we assert, that every case cited by plaintiffs involved title to, right to possession of, trespass

upon, determination of interest in, ejectment from or value of tortious use of lands or tangible personal property or purely unrestricted personal rights of the Indians. In each of such cases the judgment was or would be completely self-executing in favor of the Indians directly and in no case would require execution in favor of a stranger to the suit. And in no such case was there a "Departmental Lease" or departmental regulations providing that only the Secretary of the Interior could have control over the performance of the contract from which the alleged rights spring and would be the only one to receive the considerations payable (whatever they might be), or to determine what was due under the contract, or whether the contract was fully performed or breached in any respect. But such is the agreement and the law here.

3. The Government's Position

It is strange to us that the Solicitor General now comes into this case, nominally upon behalf of the United States, erroneously advocating that the Petitioners be now permitted to assert that which the Government has so long and consistently refused to support, though in this very case formally and informally long since invited to do so (App. 20-23).

The Solicitor General's suggestion is that the reason is to be found in "interest" in preventing racial discrimination (Am. Br. 2). Does the Government and the Department of the Interior plead guilty to long-continued acquiescence in such "discrimination"? Obviously not, because there is not such here nor in the Congressional intent nor in the Departmental purpose nor in the many cases adjudicated

by honest, fair-minded judges. The very suggestion is abhorrent to the cause of law in a case where the assumed fact is not present nor an issue, now or ever. The truth is the Government did not support the position of the Petitioners because there is no merit in their case.

The Supreme Court of Oklahoma merely decided the case brought before it as made by Petitioners below pursuant to their voluntary election (App. 17-19), *i.e*, a case for recovery of royalties alleged to be due by the terms of the lease contract. Nor does the Solicitor General strengthen Petitioners' case by the inferential suggestion (Am. Br. 5) that the Government's long acquiescence in the rectitude of Respondent's position is the result of lack of "judgment" and "zeal" of other Government attorneys. It would seem to be true that all the virtue of these qualities could not be said to rest in a few.

While recognizing (Am. Br. 5, 4) that the hazard of subjection to double-suit exposure is expressly found undesirable, unfair and unjust by Congress in its legislation applicable to the Five Civilized Tribes (44 Stat. 239, 240) but while admitting such legislation is not applicable to these Petitioners or their suit, the Solicitor General brushes this off, by making light of the problem by the unsupported statement that this "reflects the legislative approach" (not appropriate because not intended here) to make applicable to these Petitioners something admittedly not applicable, and by reference to other non-analogous anti-trust, civil rights and military service remedies which are of entirely different character and for different purposes. Then follows pure unsound rationalizing that the *degree* of risk is small (Am. Br. 5). This isn't so merely because

the Solicitor General says it is so, and the answer is to be found in the contract itself, the rules and regulations relating to it and a part of it and the many adjudicated cases to the contrary as hereinafter shown. The Solicitor General then proceeds to treat this case as if it were something *entirely different* from that which it really is. Such is recognized by indirection in the footnote 7 at page 6 of the Amicus Curiae Brief, but evasion is sought by suggesting that this is really immaterial since not here yet an issue. Nothing could be further from the truth.

If the character of the suit with which the Supreme Court of Oklahoma dealt was, under proper practice in the forum deliberately chosen by plaintiffs, clearly and expressly marked out and delineated by specific choice by the plaintiffs themselves (App. 17-19), such Supreme Court was limited thereby and by the legal rules, requirements and precedents controlling same. Neither the court nor the litigants were then at liberty to change that character or to treat the case as something it clearly was not nor was the court permitted to decide a case *not before it*. So the character of the action, questions of venue (the answer to which excludes any other character of action than that so presented) and legally and properly established procedural requirements were each then, as now, of prime importance.

Thus, neither the General Allotment Act (24 Stat. 388, as amended) nor the cases cited by the Solicitor General (Am. Br. 3, 5, 6) support Petitioners. Specific references for distinction purposes will be made to such hereinafter under the subsequent subheading "Cited Authorities Distinguished."

4. Propositions

Proposition One

The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.

As to this point, the law seems to be clear. The terms of the lease, the statutes of Oklahoma, the statutes of the United States, the Rules and Regulations of the Secretary of the Interior (which must be read into the lease) and the decisions of the state courts and of the federal courts preclude the institution and maintenance of this action for recovery by the plaintiffs. This will be demonstrated.

Upon consideration of paragraph 6 of the controlling lease (App. 7) together with the other provisions of the lease, as above quoted, and the broad specific authority reserved to the Secretary and his designees by the Rules and Regulations, also as above quoted, it becomes conclusively apparent that the Indians *agreed* that they would neither have, nor exercise nor seek to exercise any right to institute, maintain or prosecute any action "at law or in equity" either upon the lease or for breach thereof. The Secretary, *as a federal restriction* upon the lease, the land it covered and the emoluments thereof, unconditionally reserved the right to determine all the incidents of the lease, including what amounts would be due to be paid thereon, their origin, their nature and the time of payment. This necessarily included the right to determine the negatives also, *i.e.*, what is not payable and what were proper operations, what use of gas by lessee was royalty free, and all the circumstances which entered into all these things. This is accentuated by reference to Title 25, Section 172.23 above

quoted which says that the "Secretary" will cancel the lease *if at any time* he is satisfied that the provisions of the lease or the regulations have been violated. Since he has not "cancelled" the lease here involved it must be concluded that he has ascertained that neither the lease nor the regulations have been violated. It was exactly *because* of these rights of affirmative *and negative* determination that it was expressly decreed (App. 7) by the Secretary in his required form of lease (Par. 6) that *only* where "restrictions are removed" can lessors (the Indians):

> "be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The relationship of the Federal Government and the plaintiffs is that of "guardian and ward" and the unimpeachable, indestructible position of the Federal Government is well and authoritatively stated by the United States Court of Appeals for the Tenth Circuit in *Town of Okemah, Oklahoma* v. *United States* (Mar. 13, 1944), 140 F.2d 963, 964, as follows:

> "During the continuation of such guardianship, it is the right and the duty of the United States to enforce the restrictions designed for the security of the Indians by all appropriate means. 'The national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.' It has a governmental interest in the enforcement of the restrictions. It is not essential that it should have a pecuniary interest."

The difference between being an Indian "citizen" with access to the courts and one with no such access with re-

spect to a particular matter because of superior control by the United States is made clear by the Court in *In re Long's Estate*, 207 Okla. 259, 249 P.2d 103, 105-106 (1952), where it is said:

> "(1) We consider these decisions inapplicable to the case here presented. In Williams v. Steinmetz, 16 Okl. 104, 82 P. 986, we quoted with approval a statement in U. S. v. Flournoy Livestock & Real Estate Co., C.C., 69 F. 886, in which the court stated that the argument that congress could not make the Indians citizens of the United States without giving them unrestricted power to sell their property, was untenable, and that restrictions upon the sale or use of property were not affected by the fact that the owners were citizens of the United States.
>
> "And in Bowling v. U. S., 233 U.S. 528, 34 S.Ct. 659, 58 L.Ed. 1080, the Supreme Court said that the guardianship of the Federal Government over an Indian did not cease when an allotment was made and the allottee became a citizen of the United States. To the same effect is U. S. v. Noble, 237 U.S. 74, 35 S.Ct. 532, 59 L.Ed. 844."

The Court expressly held that the superior rights of the federal agency cannot be ignored or passed upon in a case when neither that agency nor the Government is a party (as here). The Court said:

> "Furthermore, the Secretary of the Interior by assuming the administration of such trust property has asserted the right to do so, and his claim of right may not be challenged in an action to which neither he nor the United States is a party. Hanson v. Hoffman, 10 Cir., 113 F.2d 780; Morrison v. Work, 266 U.S. 481, 45 S.Ct. 149, 69 L.Ed. 394."

And as pointed out in *Hallowell* v. *United States,* 221 U.S. 317, 324, 55 L.Ed. 750, 752, "citizenship" and "restriction" are two different things, the former in no wise altering, lessening or defeating the exclusive powers of the Government over the conduct of the Indian's business affecting his property.

Thus, by law and by agreement of lessors, lessee and the Secretary, actions may be instituted by the lessors involving the lease *only* upon the expressly stated conditions, which did not and do not exist here. "Restrictions" had not been removed at the times involved here, and have not now been removed, and there is no allegation in the Petition of such. To conclude otherwise than as here argued would nullify and destroy the intent and effect of the quoted language from paragraph 6 aforesaid and be an attempt to remove or interfere with federal restrictions lawfully imposed, and would destroy and interfere with the whole federal plan for the guardianship of these wards of the Government.

The established doctrine expressed in the phrase "*expressio unius est exclusio alterius*" is clearly applicable here. The statement in the lease of the particular conditions under which an action involving rights under the lease might be instituted and prosecuted by the Indians excludes the bringing or maintenance of the action by the *Indians under any other circumstances.* See: *Midland Cooperative Wholesale* v. *Ickes* (8th Cir., 1942), 125 F.2d 618; *Cornell* v. *McAllester,* 121 Okla. 285, 249 Pac. 959, 961 (1926); *Natural Gas Development Corp.* v. *Oklahoma Tax Commission,* 188 Okla. 557, 111 P.2d 483, 484 (1941). Only the

Secretary could terminate or cancel the lease by recovery of damages for its *breach,* or otherwise.

The strength of the arguments advanced above will also appear from a consideration of the authorities hereinafter cited and from the cited statutes and decisions of the courts.

The plaintiffs are not the "real parties in interest" and any judgment rendered in their favor would not bind the Government but would be an attempt to interfere with the Federal Government's guardianship, restrictions and *modus operandi* established by law. *All* the bonuses, rentals, profits, royalties and money damages are payable (not to the Indian lessors) to the Secretary. The Secretary has the exclusive right to them. The Secretary will determine what royalties he wishes to demand and what would be just and fair *not to demand. He could not be forced by this Court to take that which he does not believe is due.* And yet, *indirectly,* that would be the result of permitting these plaintiffs to recover (and they could only recover *in their own* right). And a judgment in favor of these Indians would, if valid, effectively remove "federal restrictions" to-wit: The restriction against the Indians having the right to have paid *to them* restricted funds which the Government and the lease and the law say *they may not have.* The law on this will be presented herein later.

A defendant has the right to have a cause of action prosecuted against him by all of the real parties in interest, and all parties united in interest as parties plaintiff in the subject matter of the litigation must be joined as plaintiff.

—*Haught* v. *Continental Oil Co.,* 192 Okla. 345, 136 P.2d 691 (1943);

Rule No. 17, Federal Rules of Civil Procedure.

(a) No effective "consent" was or could have been given by the "Secretary" for the plaintiffs to maintain this suit.

It may be subsequently urged that the Secretary has "consented" that these plaintiffs may sue. Such contention is here anticipated only. In truth, there was no effective consent by the Secretary or otherwise. Whatever might have been the "power" of the Secretary to furnish "consent to sue," neither he nor the Government itself could have invested plaintiffs with "standing" to maintain the action as against the already vested rights of the lessee—vested rights recognized by the Secretary and necessarily conceded to be morally and legally valid by the Secretary's refusal to file or join in the case (App. 20-23).

The "consent" (which may be but is not now urged by Petitioners) refers to a letter dated April 6, 1962, signed by "Will J. Pitner, Area Director," purporting to approve an attorney's contract between Houston Bus Hill and the Petitioners herein (App. 34-35). It is to be noted that while this suit was instituted in the District Court of Oklahoma County, Oklahoma, on the 9th day of August, 1961, the letter referred to is dated nearly a year later and it does no more than to "approve" the attorney's contract upon conditional terms. The language of this so-called "approval" shows that it does not even purport to be an attempted consent by the Secretary of the Interior that the action may be maintained by the Indians in lieu of the United States or in lieu of the Secretary.

The restrictions upon these Petitioners have never been removed. There is no indication of any kind of an intent, purpose or attempt to waive, modify, repeal, set aside,

diminish, relinquish or release any of the restrictions imposed by the departmental lease and the regulations to permit the Indians to assert those rights vested exclusively in the Secretary of the Interior, or to have paid to the Indians any of the benefits of the lease or income or emoluments flowing therefrom or thereunder. If there had been any such intent, it would have been a simple matter to have brought about a "removal" of restrictions by the Secretary of the Interior. But neither was done.

Even if it had been the intent of the "Area Director" to authorize the plaintiffs to bring this suit, such would be wholly ineffective for at least three reasons: (1) The only legal way to have done so would have been under paragraph 6 (App. 7) of the lease by removal of restrictions, and (2) the letter of Will Pitner is without legal effect to change established law, the federal statutes and the rules and regulations of the Secretary of the Interior, or any of them, and (3) no officer or agent of the Federal Government can by *ex post facto* act, destroy, ignore or obliterate the accrued property rights of a party with whom it has dealt in good faith. See: *Minnesota* v. *United States,* 305 U.S. 382 (1939).

(b) Governmental regulation is time-honored and court-approved.

The following discussion and citation of and quotation from federal court decisions indicate the character of the right of the Government with respect to these claimed rights of the Indians, with respect to the character of the funds sought to be recovered, the nature of the restrictions thereon, the exclusive right of the Secretary to enforce or

decline collection, the reasons therefor and the nature of the requirements that *all* funds be recoverable by and paid to the Secretary.

The first case discussed here is squarely in point *in every essential respect.* The opinion was written by a learned and experienced judge who had adjudicated and decided Indian affairs for many years.

Seber v. *Spring Oil Co.* (D.C., Okla. 1940), 33 F.Supp. 805, is direct authority for the proposition that these plaintiffs cannot maintain this action.

Plaintiff was a member of the Creek Tribe. A Departmental Lease for oil and gas had been executed and delivered to the Spring Oil Company covering restricted lands of the Indian. The Indian sued for casinghead gas royalties claiming they were not payable under the lease to the Superintendent because not expressly covered or provided for by the lease. Recovery was denied on the ground that the royalties *were* covered by the lease by reason of regulations of the Secretary of the Interior applicable to the lease. Plaintiff's action was dismissed on the ground that she couldn't recover the royalties since they were payable to the Superintendent.

In the opinion the Court said (809):

> "The rules and regulations of the Secretary of the Interior concerning oil and gas leases of restricted lands of members of the Five Civilized Tribes became part of the lease by express agreement of the parties and such regulations will control."

And also (810):

"In the instant case, the regulations, which were incorporated in the lease by reference, fully provided for the casinghead gas, making express provision that the Lessee shall be entitled to it and that a royalty shall be payable thereon, and fix the method of determining the amount thereof."

And finally:

"The allegation that no royalties for casinghead gas have been paid to plaintiff is immaterial, for the royalties are payable to the Superintendent of the Five Civilized Tribes, under the terms of the lease."

The Court dismissed the action by the Indian.

The *Seber* case has been followed and cited with approval on other points by many courts, among them the Supreme Court of Oklahoma in *Diehl* v. *Phillips Petroleum Co.* (Okla. 1962), 376 P.2d 203, where it is said:

"The regulation has the force of law and we are privileged to take judicial notice of same."

The decision in *Hansen* v. *Hoffman* (10th Cir., 1940), 113 F.2d 780, also contains an excellent discussion upon this subject. Headnote 14 reads:

"So long as legal title to restricted funds of Indian derived from restricted allotments of Indian remained in hands of Secretary of Interior subject to his administration and control and within his quasi-judicial power, that power could not be controlled or restrained by judicial action."

In *United States* v. *Hinkle* (8th Cir., 1919), 261 Fed. 518, it is held:

> "* * * the exclusive custody and control of mineral rents and profits derived from restricted lands * *.* is vested in the Secretary of the Interior, subject only to such rules and regulations as he may prescribe."

In *United States* v. *Fitzgerald* (C.A. 8, 1912), 201 Fed. 295, the Court, speaking through Judge Sanborn, held that the taking of a restricted Indian's property

> "was an infringement of the governmental rights of the United States, and hindrance of its governmental policy and a wrongful seizure of the lawful means it was using to carry that policy into effect"

and, therefore, an invasion of the Government's rights for which the Government must sue.

In *House* v. *United States* (10th Cir., 1944), 144 F.2d 555, it is expressly held that:

> 1. Royalties accruing to restricted lands are and remain trust funds even though paid out monthly by the Superintendent to the Indian, and
>
> 2. Such funds do not even pass to the Executor or Administrator of the dead Indian to whose credit they stand on the books of the Government.

In *Butler* v. *Denton* (D.C., Okla. 1945), 57 F.Supp. 656, *aff'd* 150 F.2d 687, the Court held that a suit against the executor of a deceased restricted Indian to establish the interest of the plaintiff Indian in and to restricted funds of the dead Indian, such funds being then in the hands of the Superintendent, could not be maintained. Not even the executor is entitled to sue for or have judgment for or possession of such funds. See also: *Ward* v. *United States* (10th Cir., 1943), 139 F.2d 79; *United States* v. *Williams*

(10th Cir., 1943), 139 F.2d 83, *cert. den.* 322 U.S. 727; *LaMotte* v. *United States*, 254 U.S. 570, 65 L.Ed. 410 (Okla. 1921).

If the relief sought would, if granted, conflict or interfere with United States restrictions, management, supervision or operations of Indian lands or their profits or rentals or royalties therefrom, then no relief can be granted. *Bunch* v. *Cole*, 263 U.S. 250, 68 L.Ed. 290 (1923); *Sperry Oil Co.* v. *Chisholm*, 263 U.S. 488, 68 L.Ed. 803 (1924); *Bowling* v. *United States*, 233 U.S. 528, 58 L.Ed. 1080 (1914); *Barbre* v. *Hood* (8th Cir., 1916), 228 Fed. 658; *United States* v. *Moore* (8th Cir., 1922), 284 Fed. 86, 90; *Utilities Production Corp.* v. *Carter Oil Co.* (D.C., Okla. 1933), 2 F.Supp. 81, *aff'd* 72 F.2d 655; *Phenninghausen* v. *Horineck*, 112 Okla. 94, 240 Pac. 81 (1925).

The above cases demonstrate beyond cavil that the requirements that *all* funds shall be paid to the Secretary is mandatory, for a purpose and constitutes a federal "restriction" imposed by federal law. The ones now cited emphasize the point.

Rents and royalties from restricted lands are also restricted unless relieved therefrom by affirmative act of the supervising government. *United States* v. *Noble*, 237 U.S. 74, 59 L.Ed. 844 (Okla. 1915); *Motte* v. *United States*, 283 U.S. 747, 75 L.Ed. 1385 (Okla. 1931); *Parker* v. *Richard*, 248 U.S. 235, 63 L.Ed. 954 (Okla. 1919); *Ickes* v. *Perry* (C.A., D.C., 1933), 64 F.2d 982; *King* v. *Ickes* (C.A., D.C., 1933), 64 F.2d 979.

In *United States* v. *Hellard*, 322 U.S. 363, 88 L.Ed. 1326 (Okla. 1944) (an important case), it is squarely held that

even though the state courts are given jurisdiction to partition restricted Indian lands, the lands are still "restricted" and the United States is an essential party to the proceeding without the presence of which no valid judgment can be entered.

A requirement by regulation that mineral rentals, royalties and profits from a lease on restricted Indian lands be paid to the Secretary of the Interior is a federal "restriction" which the state courts must honor and abide by. *Motte* v. *United States,* 283 U.S. 747, 75 L.Ed. 1385 (Okla. 1931); *Bunch* v. *Cole,* 263 U.S. 250, 68 L.Ed. 290 (1923); *Hansen* v. *Hoffman* (10th Cir., 1940), 113 F.2d 780; *Bowling* v. *United States,* 233 U.S. 528, 58 L.Ed. 1080 (1914); *Chisholm* v. *House* (10th Cir., 1947), 160 F.2d 632; *United States* v. *Brown* (8th Cir., 1925), 8 F.2d 564, *cert. den.* 270 U.S. 644.

It must follow that a suit which cannot proceed to judgment, because of facts clearly appearing from plaintiffs' Petition and because of established law which the court does not have judicial power or authority to change, alter, revise, ignore or add to, must be dismissed upon demurrer.

(c) Compulsory compliance by Lessee with operational requirements of "Secretary" clothed Lessee with protection against adverse claims of Indian wards growing out of such compliance.

As inherent in the action of the trial court and as expressly stated (App. 63) by the Supreme Court of Oklahoma, there is here no charge that the lessee, Skelly Oil Company, failed, neglected or refused to operate the lease in conformity with directions of the federal supervisors and, stated in accord with the belief of "the responsible officials

of the Department of the Interior," it actually did comply with such directions, *the United States having determined not to sue and having refused an invitation to come in and take this case over.*

Conceded that this lessee contracted in good faith with the Indian-lessors and the Secretary of the Interior, and thus with the United States, that it would comply exclusively with the directions of the supervisory officials of the Department in the operations of the lease, in return for which it was given assurance that if it did so, it would be free of interference and litigation by the Indian-lessors as long as the Secretary had not removed restrictions upon the Indians, what kind of law would it be which would say that notwithstanding, the Indian-lessors, being still restricted, may "disagree" with the decisions and directions of said supervisors after *compliance therewith* and seek to recover damages or whatnot from the lessee for doing that which the supervisors had approved and/or directed? Would such not be an impairment of the obligation of contract? Would such be either moral or just?

Would it not be a form of judicial or legal oppression to adhere to and enforce a pronouncement that even though it is clear from the pleadings that these Petitioners cannot succeed, they must be afforded an opportunity by a trial to secure a favorable judgment which would run afoul of the law, or at least needlessly and futilely punish an innocent adversary by requiring a defense at great cost and expense?

In connection with the above, please see *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 338 (9th Cir., 1956), *cert. den.* 352 U.S. 988, and *United States* v. *Barns-*

dall Oil Company (10th Cir., 1942), 127 F.2d 1019. More than this, the Court should not do a futile and useless thing by reversing the judgment herein since under the above authorities it could only terminate in the same end-result. *Moviecolor Limited* v. *Eastman Kodak Company* (2nd Cir., 1961), 288 F.2d 80, 88, *cert. den.* 368 U.S. 821.

(d) Permitting maintenance of this suit to possible recovery against the Lessee would set a precedent resulting in destruction of governmental regulation.

It may be suggested that after the fact the Secretary may consent to the Indian's bringing suit if the Indian "disagrees" with the Department's previous decisions. But such is not tenable. Neither is it practical nor legal.

Under an announced and effective policy such as this, what lessee would be willing to enter into a departmental lease? Such lease would require it to abide by the regulations, follow directions of the supervisor and/or operate with his approval, knowing that if the restricted Indian "disagreed," for any reason, after accomplishment, the lessee could be and probably would be sued by the Indian-lessor. This would be so even though what had been done was not the result of the lessee's own choice or judgment. In each case, in each instance, and in any event the lessee would be required to protect itself by insistence upon formal concurrence by the lessor in every decision made by the supervisor. How could a lessee operate otherwise to protect itself against the clear and ever constant hazard?

If there is to be an end to traditional effective regulation and supervision by the Government heretofore Congressionally established for the necessary protection of

Indian wards, it ought not to be brought about by the judiciary or the executive. *United States* v. *9,345.53 Acres of Land* (D.C., N.Y., 1966), 256 F.Supp. 603. And neither the judiciary nor the executive should impair the obligation of its Government's contract with the Respondent. Nor should a state court be directed or permitted to do so. U. S. Constitution, Art. 1, Sec. 10. If such is not to be, then a reversal herein would be a futile act indeed—a mere empty academic gesture. This is assuredly true because in a trial upon the merits the existing contract would require judicial bar to recovery by the plaintiffs in this action.

5. Cited Authorities Distinguished

Since practically all of the cases cited by Petitioners and Amicus Curiae in their briefs have to do with the subject matter of the argument here presented under our Proposition One, this is the most appropriate place in this Brief to call attention of the Court to the great distinction which exists between the class and type of cases cited and relied upon by Petitioners, on the one hand, and the case at bar, on the other hand.

Upon a mere reading of the cases cited by Petitioners they furnish their own distinction, as to both law and facts, from the case at bar. But brief reference to the principal distinguishing points in the cases upon which reliance is placed by plaintiffs may be helpful and justified.

It may be well first to point out that a general distinction exists between cases involving members and lands of the Five Civilized Tribes and those involving other Indians and also between cases involving "Departmental Leases"

and those not so doing (Am. Br. 4, Footnote 3). In the first class of cases there is a specific statute applicable to members and lands of the Five Civilized Tribes (Act of April 12, 1926, 44 Stat. 239) which has no application to other Indians, other Indian Tribes and other Indian lands. In the second class of cases "Departmental Leases" (and regulations pertaining thereto which are a part thereof) leave full control of *everything* in the Secretary of the Interior, while such is not true where the lease is upon another form.

Sadler v. *Public National Bank and Trust Company of New York* (10th Cir., 1949), 172 F.2d 870 (Pet. Br. 8, 10), was a case in which members of the Five Civilized Tribes brought an action under the Federal Statute relating to the Five Civilized Tribes (44 Stat. 239, upon which the case really turned), to cancel an oil and gas lease, to recover possession of the land, to quiet title and to partition same. United States was notified under the statute and appeared in the cause. Nothing in the decision indicates any control by the Secretary of the Interior over the income from the lease or its royalties or its operations. Neither does anything in the opinion indicate that the Secretary of the Interior had the sole right, as in the case at bar, to determine whether or not the lease had been breached. In other words, no Departmental Lease was involved and the Indians themselves were free to declare the lease breached without being required to have this determined by the Secretary of the Interior as is the case here. Neither was there in the *Sadler* case any applicable requirement of law or regulations that the matters involved be first submitted to administrative determination by the Secretary. See Sec. 221.66 of Title 30, Code of Federal Regulations—Mineral Resources Chapter II.

Choctaw and Chickasaw Nations v. *Seitz* (10th Cir., 1951), 193 F.2d 456 (Pet. Br. 10, Am. Br. 4), was an action brought by the two tribes (Five Civilized Tribes) to recover possession and establish title to their lands in Oklahoma.

The United States Supreme Court cases are likewise clearly distinguishable. *Heckman* v. *United States*, 224 U.S. 413, 56 L.Ed. 820 (Pet. Br. 8, 10, Am. Br. 4), was an action by the United States for members of the Five Civilized Tribes (Cherokees) to recover and quiet title to Cherokee allotments which had been conveyed by void deeds by the Indians. The dictum in that case, to which reference is frequently made, is limited to the right of "an allottee" (of the Five Civilized Tribes) to "enforce his right to an interest in the tribal or other property." See the statement of this distinction in *United States* v. *Waller*, 243 U.S. 452, 453, 61 L.Ed. 843, 847 (1917). *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 10, 63 L.Ed. 504 (Pet. Br. 10), was an action brought by the Pueblo to enjoin administrative officers of the United States from selling their land in disregard of their ownership. There was no semblance of an agreed or a provided restriction against the Indians in this type of case such as a Departmental Lease would be. *Felix* v. *Patrick*, 145 U.S. 317, 36 L.Ed. 719 (Pet. Br. 10) was an action by heirs of a half-breed Indian to recover land asserted to be held in trust on account of fraud perpetrated upon an Indian ancestor of plaintiffs by means of which fraud the alleged "Trustee" took the land in his own name instead of taking it for the Indian. The land, if taken in the Indian's name, would not have been restricted against sale in the hands of the Indian, and there was actually no question in the case of the right to institute and maintain the action since the

Federal Government had received no interest, control or supervision thereover. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 47 L.Ed. 299 (Pet. Br. 10), was a suit by authorized representatives of Indian Tribes against the Secretary of the Interior of the United States to abrogate a treaty with the United States as not having been fairly arrived at or properly executed. This case is obviously not in point. *Creek Nation* v. *United States*, 318 U.S. 629, 87 L.Ed. 1046 (Pet. Br. 10), was merely a suit by Indian Tribes against the United States, filed under specific statutory authority, for damages for failure to "keep the peace" under existing treaties. Its lack of relevance here is immediately apparent. *United States* v. *Candelaria*, 271 U.S. 432, 70 L.Ed. 1023 (Pet. Br. 10), was an action by the United States to quiet title to lands belonging to the Pueblo. A previous action had been brought by the Pueblo to establish and quiet its title to these lands against which there was no restriction nor was there a contractual obligation forbidding the institution and maintenance of the suit.

The citation of *Scott* (154 U.S. 34), *Virginia* (100 U.S. 339) and *New York Times* (376 U.S. 254) on page 12 of Petitioners' Brief would seem to be absolute but unintended support for Respondent's contention, subsequently advanced herein, that there is really nothing here for this Court to review since Respondent was denied equal protection of the law when the Supreme Court of Oklahoma refused to dismiss plaintiffs' appeal to that court. Neither of the above cited cases supports plaintiffs' claims here asserted for in the case at bar neither the trial court nor the Supreme Court of Oklahoma based or rested its decision upon any state statute or rule of state court and certainly not one

or more which are inconsistent with the Federal Constitution.

The terms and provisions of the General Allotment Act, as amended 25 U.S.C. 331 *et seq.*, 396 *et seq.*) referred to by the Solicitor General (Am. Br. 2-3) do not support Petitioners but on the contrary furnish statutory support for differentiation between the principles controlling the case at bar and the case assumed by the Solicitor General and Petitioners.

They also serve to emphasize the difference between the Congressional intent with respect to anti-trust, civil rights and military privilege cases and a case where the suit is to recover "royalties" due to the Secretary under a Departmental Lease on lands of Comanches held "in trust" by the United States. "Double-exposure" is expressly permitted and even directed by statutes involved in the cases (Am. Br. 5-6) exemplified by *United States* v. *Borden Co.* (anti-trust), 347 U.S. 514 (1954); *California* v. *Buzard* (military privilege), 382 U.S. 386 (1966), and *United States* v. *Arlington County* (military privilege), 326 F.2d 929 (4th Cir., 1964). They emphasize as well the difference between this suit and a suit to recover possession of, quiet title to or make secure an interest in the land itself or actual damage thereto.

The distinction lies in this: While the special statutes providing for private anti-trust suits, private civil rights suits and private military personnel suits expressly spell out that concurrent remedies are available to the citizens and the Government, and while this is also provided for in case of necessary action to protect the land of the Indian and possession and title thereto, such is obviously the opposite

result of express statutes relating to income receivable by virtue of contract over which the Secretary is expressly given by statute (as long as restrictions are not removed) exclusive control, including right of determination of amount, right of receipt and right of disposition (25 U.S.C. 396).

The decision in *Skokomish Indian Tribe* v. *France* (9th Cir., 1959), 269 F.2d 555, cited by the Solicitor General at pages 2, 4 and 6 of his Brief, is no more apposite. That was a suit by a tribe under a treaty to quiet title to lands set aside for it under that treaty and an executive order. This is vastly different from the case at bar as above established. Even so, the tenor of the whole opinion is in no wise contrary to Respondent's position here but rather tends to favor it.

Other cases relied upon by the Solicitor General, also cited by Petitioners, have been treated of above.

Proposition Two

Even assuming, *arguendo*, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.

As to this point, it will be made clear by a reading of the Petition, the lease attached and the Rules and Regulations above referred to, that essential allegations to state a cause of action are missing from the Petition. For instance, there is no allegation of a specific violation of the rules and regulations of the Secretary of the Interior or that what was

done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is no allegation of application to the Secretary (or his designees) and his arbitrary or fraudulent refusal to hear or decide or to grant relief. Neither is there any allegation to challenge or negate the obvious view of the Secretary of the Interior that neither the lease nor the regulations "have been violated." This finding and satisfaction are necessarily established by the absence of action by the Secretary, under the duty imposed upon him and the exclusive authority given him by Title 25, Section 172.23 above quoted, to cancel this lease if there has been a "violation" of the lease or regulations. It must be presumed, in the absence of specific and express allegations to the contrary, that the Secretary of the Interior through his designated Supervisor performed his full duty and adequately supervised the operation of this lease and the production of oil therefrom in the interest of the lessors and that the rights of the lessors were adequately and properly safeguarded in the course of these operations by the Supervisor.

In *Bonds* v. *Sherburne Merc. Co.* (9th Cir., 1948), 169 F.2d 433, *cert. den.* 335 U.S. 899, 93 L.Ed. 434, a situation, similar to that here, involved Indian lands and official action by the Department of the Interior. There the Court said with respect to the designated officials:

> "it is presumed that they performed their official duties and that the Secretary of the Interior had found to his satisfaction"

the facts necessary to support his action or inaction.

The following federal and Oklahoma cases also announce and apply the same rule under and to many and varied issues and circumstances: *U. S. ex rel Harris* v. *Ragen* (7th Cir., 1949), 177 F.2d 303; *Laughlin* v. *Cummins* (C.A., D.C., 1939), 105 F.2d 71; *Shafer* v. *U. S.* (4th Cir., 1956), 229 F.2d 124, *cert. den.* 351 U.S. 931; *U. S. Hoffman Mach. Corp.* v. *Lauchli* (8th Cir., 1945), 150 F.2d 301; *Hicks* v. *Sanders,* 132 Okla. 242, 269 Pac. 297 (1928); *Southwestern Surety Ins. Co.* v. *Davis,* 53 Okla. 332, 156 Pac. 213 (1916); *Bonapart* v. *Nelson,* 142 Okla. 54, 285 Pac. 100 (1929).

Therefore, it must be presumed, in the absence of express allegation to the contrary, that the Supervisor found that under the particular circumstances there was no basis for demanding the royalties here sued for, such as: (1) that there was no market for the gas; (2) that the gas vented was "beneficially consumed"; (3) that the only alternative was to flare the gas and produce the oil and receive the oil royalties rather than to shut the oil production down and see adjoining lease production drain the oil from the Aitson Lease, all the while receiving no oil royalty from oil produced; and (4) that the vented casinghead gas was used by lessee in the production of oil and thus royalty free. It must be presumed that all of the factors were weighed and that it was determined that the only way to produce the oil in accordance with the terms of the lease was for Skelly to flare the casinghead gas and thus "use" the casinghead gas in the course of its operations in the production of oil. See lease paragraph 3(c) where it is agreed that:

> "* * * oil, and/or gas used by the lessee for development and operation purposes on said lease * * * shall be 'royalty free'."

If it be presumed, as it must be, that the Secretary and his Supervisor and his superior and the Commissioner of Indian Affairs did their duty, there would seem to be no question but that authorization to flare the casinghead gas *royalty free,* in order to get the oil, has been received by the lessee from the only power which could refuse such authorization. Also, under such presumption every fact, every demand, every equity, every circumstance has been considered, weighed and given effect by the Secretary. No intervention or substitution has been sought by the United States. Thus, going even beyond presumption, it is established that the United States officials did their duty and decided that there was no just cause for demand on the defendant for the alleged "royalty" sought to be recovered.

Once the Secretary has acted (either to do something affirmatively or to waive something or to do nothing about a known course of action) neither his acts nor waiver nor inaction is controllable by the courts unless and until it is shown that *he was called on in proper manner* to act and either did so or refused to do so *arbitrarily* or *fraudulently.* No predicate for this has been laid here and there is no such charge.

The decision in *United States* v. *Barnsdall Oil Co.* (10th Cir., 1942), 127 F.2d 1019, is strongly indicative of the power and authority of the Secretary of the Interior in prescribing the terms of the lease and in exercising discretion as to operations. The case stands for the proposition that the lessee will be fully protected (even in a suit by the Government itself) where it has followed and abided by rulings, decisions and supervision by the Department. This is an important case.

To the same effect is the decision in *United States* v. *Ahtanum Irrigation District* (9th Cir., 1956), 236 F.2d 321, where the Court held:

> "The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indian's rights, his lack of bargaining skill or determination may add up to an abuse of power but do not negative it or make his act ultra vires."

The act of the Secretary was held valid and binding.

In the case of *Diehl* v. *Phillips Petroleum Company* (Okla. 1962), 376 P.2d 203, the Supreme Court of Oklahoma squarely held that in all cases of leases executed under authority of federal statutes and regulations of the Secretary of the Interior such regulations must control where applicable; that the Court must take judicial notice of the federal statutes and the regulations of the Secretary applicable to the lease and that if it appears from either the lease or the regualtions that they cover the particular matter in litigation there is not room for or possibility of applying to the situation a side or collateral contract and that the contract must be disregarded and the regulations applied. In that case the Supreme Court held that where the regulations of the Secretary of the Interior contemplated that the lessee would have a right to lay and maintain service lines, rods and pipes there could be no recovery by the plaintiffs of damages for the laying and maintenance of these lines, rods and pipes even though a side or collateral contract between the parties would otherwise have required the paying of such damages.

It may be argued here that certain acts of the lessee have themselves amounted to technical violations of the

lease, and the Rules and Regulations. Such is not so, but assuming technical violations by lessee, it is clear that the Secretary has the right to (1) construe them as non-violative, to (2) find them justified, to (3) excuse them under the circumstances, and to (4) waive the violations in order to secure greater benefits.

Proposition Three

Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in this Court.

As indicated by the lease and all the Rules and Regulations above quoted, the lessor Indians have had at all times a complete and comprehensive administrative remedy within the Department. The nature and course of such a remedy is fairly illustrated by the recitals in the opinion of the Court in *California Oil Co.* v. *Seaton, Secretary of the Interior* (D.C., Cal., 1960), 187 F.Supp. 445, *aff'd* 296 F.2d 384.

Sec. 172.23 of Title 25 and Sec. 221.66 of Title 30, above referred to and quoted, of the Rules and Regulations of the Secretary of the Interior makes this unmistakable and expressly clear. In the latter it is provided, *inter alia*:

> "An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. * * * An appeal to the Director may be taken from any order of the supervisor * * *. An appeal from any decision of the Director may be taken to the Secretary * * *. With regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director."

Nothing is more fundamental nor better established than that a litigant must exhaust his available administrative remedies before seeking judicial relief. This is well established by decisions of both state and federal courts.

In *Speaker* v. *Board of County Commissioners* (Okla. 1957), 312 P.2d 438, it is stated and held that where an administrative remedy is provided by law, relief must be sought from the administrative body, and such remedy must be exhausted *before the courts will act,* and the exhaustion of the administrative remedy is a jurisdictional prerequisite for resort to the courts. See also: *Sanders* v. *Oklahoma Employment Securities Commission,* 200 Okla. 366, 195 P.2d 272 (1948); *Constantin* v. *Martin* (C.A., Okla. 1954), 216 F.2d 312; *Furrow & Co.* v. *American Airlines* (D.C., Okla., 1952), 102 F.Supp. 808.

Plaintiffs have made no move to exercise their administrative remedy. For this reason alone, even assuming (which we continue to deny) that plaintiffs otherwise would have had standing in court, the demurrer was good and must have been sustained and the action dismissed.

Proposition Four

Correction here of a constitutional error by the Supreme Court of Oklahoma against the Respondent contrary to the Fourteenth Amendment guaranteeing due process and equal protection of the law renders the judgment of the District Court of Oklahoma County, Oklahoma, unassailable.

A basic fundamental precept of appellate court practice is that an appellee may, without cross appeal, show that errors were committed against him below which when corrected will require affirmance. *United States* v. *American*

Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087 (1924); *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191, 81 L.Ed. 593 (1937); *Commercial National Bank in Shreveport* v. *Parsons* (5th Cir., 1944), 144 F.2d 231. See also: *Silber* v. *United States*, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). There is a plethora of state Supreme Court decisions to this effect, among which are those of the Supreme Court of Oklahoma itself, such as: *American National Bank of Oklahoma City* v. *Ardmoreite Publishing Co.*, 123 Okla. 225, 253 Pac. 81 (1927); *Gilchrist* v. *Lowry*, 195 Okla. 537, 159 P.2d 261 (1945). Upon this principle, Respondent earnestly presents and supports the above stated proposition upon the basis of the following facts.

The Oklahoma Legislature in 1963 enacted into law, accepted by the Supreme Court of Oklahoma (App. 53-61) as binding upon it, a statute (H.B. No. 562, Oklahoma Session Laws 1963, p. 326, 12 O.S.A. 1963 Supp. 651) amending 12 O.S.A. 651 and reading in part:

> "A new trial is a re-examination in the same court of an issue of fact, or of law, either or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court."

By the Constitution of Oklahoma (Art. 5, Sec. 58, Art. 6, Sec. 11—App. 55) this statute, carrying the emergency clause, became effective on the 13th day of June, 1963, *more than three months before* the judgment of the District Court (App. 55, 56-60) in favor of this Respondent was rendered and entered on September 20, 1963. No motion for new trial was filed by plaintiffs, these Petitioners. When the appeal was lodged in the Supreme Court of Oklahoma (App. 48), the defendant in error, Respondent

here, filed its Motion to Dismiss the Appeal (App. 50) upon the jurisdictional ground of fatal failure to file a motion for new trial as a necessary predicate for the appeal. Involving, as it did, a question of jurisdiction, it was really a matter which the Court would have been required to raise and decide *sua sponte*. The Supreme Court of Oklahoma denied the motion, though it held expressly, in substance and by essential implication (App. 53-61, 394 P.2d 515, July, 1964), that: (1) jurisdiction to entertain an appeal is governed by the law in force and effect at the time the judgment sought to be reviewed was rendered (App. 55); (2) the statute requiring a motion for new trial was in force when the judgment was rendered on September 20, 1963 (App. 46, 51, 55) and was thus by its terms applicable to this judgment; (3) a motion for new trial was mandatory and a condition precedent to jurisdiction to review (App. 57-60); and (4) the duty of the Supreme Court of Oklahoma is to apply the statute (App. 58, 60, 61) to avoid destruction of "legislative intent." Thus, the Supreme Court of Oklahoma refused to apply the statute to this case (App. 60-61), postponing its operation (contrary to the Oklahoma Constitution), but to be applicable to all others under similar circumstances "after this opinion becomes final" (App. 60-61). An appeal was not then possible because defendant in error had not yet sustained any redressable legal injury as by reversal.

Thereafter and in numerous cases (40), the Oklahoma Supreme Court has consistently applied the statute and dismissed on jurisdictional grounds each appeal where motion for new trial was not filed, presented and denied. Exemplifying and illustrative of the many such decisions

and instances are: *Stokes* v. *State of Oklahoma*, 410 P.2d 59 (Okla., Oct., 1965); *Evans* v. *Wilkinson*, 419 P.2d 275 (Okla., May, 1966) and cases cited therein at page 276; and *St. Louis-San Francisco Ry. Co.* v. *Pinkston*, 420 P.2d 537 (Okla., Aug., 1966). See Shepard's Pacific Reporter Citator for many additional decisions.

Thus it appears indisputably that the statute enacted by the Oklahoma Legislature in a field admittedly lawfully pre-empted by it, was applicable to all *without classification or distinction.* Its denial of jurisdiction to the Supreme Court of Oklahoma where no motion for new trial is filed was without exception and without postponement as to operation and effectiveness. Such did not clothe the judiciary with power to extend, to make exceptions or classification *or to do otherwise than to enforce it as to everyone.* All this is patently clear from the very Supreme Court opinion (App. 53-61) arbitrarily refusing to apply the statute to protect this respondent's right to insist that the appeal be dismissed, but saying it must be subsequently applied to protect all others *under exactly similar circumstances.* This was followed by uniform instances of such actual, unbending and effective application to all such others, there citing as compelling the very statute here and there relied on and the opinion of the court previously refusing to apply it for Skelly's protection. And this was without supervention of law or fact. This is thus made not one law for all but was made one law for Skelly Oil Company and a different law for all others (who were exactly the same) as promulgated and enforced by an agency of the State of Oklahoma and thus by that State.

It is clear that this denied equal protection of the law and due process to Respondent. To this Court which has been, for at least the past decade, most vitally concerned with guarantees of rights under the Fourteenth Amendment, it would appear to be "carrying coals to Newcastle" to cite authority. Reference, however, is again made to the cases cited at page 12 of Petitioners' Brief. The point is thus submitted.

If, as a matter of constitutional right, this Respondent's motion to dismiss should have been sustained by the Supreme Court of Oklahoma and this right be now adjudicated and acclaimed, there is nothing here for review. In any event, this affords another reason why Petitioners must be relegated to their administrative remedy.

VI. CONCLUSION

1. It is respectfully submitted by the Respondent that upon the merits of the controversy as presented to it by the appeal of the Petitioners herein, the decision of the Supreme Court of Oklahoma is correct and is in line with authoritative Congressional enactments, Rules and Regulations properly adopted and enforced, the contract between Skelly Oil Company and the lessors including the United States, consistent with the Constitution of the United States, federal statutes, the Constitution of Oklahoma and its statutes and authoritative precedent of long standing and should be in all things affirmed.

2. It is also respectfully submitted that violation of the Federal Constitution by the Supreme Court of Oklahoma operating to the prejudice of this Respondent in denying to

it equal protection of the laws and in placing it in a position where its property may be thus taken without due process of law must be corrected in and by this Court and that if, as and when so corrected, one or the other of the following alternatives should be adopted by this Court:

(a) Writ of Certiorari heretofore issued by this Court to the Supreme Court of Oklahoma should be recalled, cancelled, set aside and withdrawn and the decision of the Supreme Court of Oklahoma be permitted to become final; or

(b) This proceeding should be dismissed upon the basis of a Writ of Certiorari improperly granted; or

(c) If remand be considered necessary, the Supreme Court of Oklahoma should be directed upon such remand to dismiss the appeal of the Petitioners here, plaintiffs in error there, allowing the judgment of the trial court in favor of this Respondent to become, be and remain final.

Respectfully,

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